

May 19, 2005

Valentin J. Lopez
3095 Eastern Avenue, #94
Sacramento, CA 95821

**Re: Your Request for Informal Assistance
Our File No. I-05-082**

Dear Mr. Lopez:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ Because your question does not provide a specific situation that could create a conflict of interest, we are treating your request as one for informal assistance.² In addition, please be aware that the Commission does not advise with respect to past conduct. (Regulation 18329(b)(8)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct which may have already taken place, and any conclusions contained herein apply only to prospective actions.

QUESTION

As an employee of the California Highway Patrol (“CHP”) would you be precluded from creating a business that provides online employment, educational, and licensing practice tests?

CONCLUSION

The Act does not bar public officials from maintaining outside employment during their tenure as public officials. However, a conflict of interest under the Act can arise within the context of specific governmental decisions that have reasonably foreseeable material financial effects on one or more of an official’s economic interests, including your business interests and sources of income to that business. If your economic interests are implicated in a governmental decision in your capacity as a public

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; regulation 18329(c)(3), copy enclosed).

official, they may involve a conflict of interest as that term is defined by the Act. You have provided no facts to analyze a specific prospective factual situation.

In addition, we strongly suggest that you consult the CHP's statement of incompatible activities for guidelines when considering receiving outside income concurrent with your position with the state agency.³

FACTS

You are a supervising personnel selection consultant and manager for all personnel testing at the CHP. You have developed an online practice test service business which will provide online employment, educational, and licensing practice tests. The website is currently being finalized by a company in Montana. Although the service may be used by employees who are interested in employment with the State of California, this service will not be directed to California state employees or prospective employees in any way. For example, you intend to offer an entry clerical test that parallels the test that is presented as a sample test for the County of Los Angeles. This examination will be marketed nationwide and will not target California state service in any way. However, it is conceivable that a candidate interested in employment with the State of California could take this test in preparation for a written test.

ANALYSIS

As an employee of the CHP, you are considered a public official within the meaning of the Act. (Section 87103, regulation 18701.) The Act does not prohibit a public official from accepting employment with employers outside of government. There are, however, other bodies of law that sometimes restrict such employment such as the law governing "Incompatible Activities of State Officers and Employees." The Commission cannot offer advice in those areas and refers you instead to the Office of the Attorney General or to CHP's own counsel. In this letter, we limit our advice to the requirements of the Political Reform Act and, specifically, to the Act's conflict of interest provisions.

Although the Act does not bar a public official from holding any form of private-sector employment, its conflict of interest rules prohibit (with limited exceptions) any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. (Sections 87100 and 87103.) In applying this law, the Commission employs an eight-step analytical framework to assist in determining whether a public official has a disqualifying conflict of interest.⁴ (Regulation 18700(b) (1) - (b) (8).) The conflict-of-

³ We also encourage you to contact the Attorney General's office for questions regarding contracts between your practice test service and any California state agency.

⁴ Enclosed is the Commission fact sheet entitled "*Can I Vote? Overview of the Conflicts Laws*," which details all eight steps for your future reference.

interest rules are, therefore, purely situational and require a specific pending governmental decision. Your inquiry, however, is a general one, made without reference to any specific governmental decision. Instead, the focus of your concern is the potential for your anticipated business and future clients to create conflicts of interest.

A public official has a disqualifying financial interest in a governmental decision, within the meaning of section 87100, if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, or on a member of the official's immediate family.

There are six kinds of economic interests from which conflicts of interest may arise. They are defined in section 87103 and regulations 18703-18703.5 and include:

- An interest in a business entity in which a public official has a direct or indirect investment⁵ of \$2,000 or more. (Section 87103(a), regulation 18703.1(a).)
- Any business entity in which a public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d), regulation 18703.1(b).)
- An interest in real property in which a public official has a direct or indirect interest of \$2,000 or more. (Section 87103(b), regulation 18703.2.)
- Any source of income, including promised income, to the public official which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c), regulation 18703.3.)
- Any source of gifts to the public official if the gifts aggregate to \$360⁶ or more within 12 months prior to the decision. (Section 87103(e), regulation 18703.4.)
- A public official also has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family, also known as the "personal financial effects" rule. (Section 87103, regulation 18703.5.)

⁵ Section 87103 defines an "indirect investment" or interest as "any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater."

⁶ The gift limit amount is adjusted biennially by the Commission to reflect changes in the Consumer Price Index. As of January 1, 2005, the amount is \$360. (Section 87103(e), regulation 18940.2.)

From your account of the facts, it is possible that payments to your business may not be included in the Act's definition of "income," which provides at section 82030(a) that: "Income," other than a gift, does not include income received from any source outside the jurisdiction and not doing business within the jurisdiction, or not having done business within the jurisdiction during the two years prior to the time any statement or other action is required under the Act.⁷ For purposes of the Act, the term "jurisdiction" means the state with respect to a state agency. (Section 82035.) Thus, as long as the source of your income is outside the State of California, does not do business or plan to do business within the State of California, or has not done business within the State of California during the two years prior to the time any governmental decision is made, the compensation you receive from that source is not considered income for purposes of the conflict of interest provisions of the Act.

We will go through a similar analysis to determine whether your business is an "investment" under the Act. First, we look to the Act's definition of "investment," given at section 82034. "Investment" is defined, in pertinent part, as follows:

"... any financial interest in or security issued by a business entity, including but not limited to common stock, preferred stock, rights, warrants, options, debt instruments and any partnership or other ownership interest owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family, *if the business entity or any parent, subsidiary or otherwise related business entity has an interest in real property in the jurisdiction*, or does business or plans to do business in the jurisdiction, or has done business within the jurisdiction at any time during the two years prior to the time any statement or other action is required under this title." (Emphasis added.)

As stated above, for purposes of the Act, the term "jurisdiction" means the State of California with respect to a state agency. (Section 82035.) Because you are located in the jurisdiction of your agency, it appears that you may have an economic interest in your proposed business as an investment. Further, if your business plans to do business in the State of California, which appears likely given that you intend to offer tests to applicants for employment with the County of Los Angeles, your business will be doing business in the jurisdiction and, thus, will be considered to be an investment of yours. You will also have an economic interest in those clients to your business if any single client is a source of income to you totaling at least \$500 over any 12-month period. At this stage, we can say that there is a potential for a conflict of interest at any time when you assume a governmental decisionmaking role where it is possible that the decision in question will have a material financial effect on your investment interest or sources of income. It would then be necessary to determine whether you were indeed making, participating in

⁷ See also regulation 18230, copy enclosed.

making, or influencing a governmental decision, whether it was foreseeable that the decision would impact one of these economic interests, and whether any such impact would amount to a “material financial effect,” as defined by statute and regulation. (Regulations 18700-18708.) We stress, however, that all of these elements must be found before a conflict of interest is established. The existence of outside economic interests, alone, does not constitute a conflict of interest for a public official within the meaning of the Act.

If at any time you believe that you may have a financial interest in a specific, upcoming governmental decision, please feel free to contact me for further advice at (866) 275-3772.

Sincerely,

Luisa Menchaca
General Counsel

By: Adrienne Korchmaros
Political Reform Consultant
Technical Assistance Division

Enclosures

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